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THE RELATION OF THE ALIEN TO THE ADMINISTRATION OF THE CIVIL AND CRIMINAL LAW.

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George Washington in his farewell address left a message which may be taken as helpful and inspiring advice by those who have deeply at heart the assimilation of the alien in our midst.

"It will be worthy of a free, enlightened and, at no distant period, a great nation," he said, "to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence."

The nation which Washington so supremely served has, indeed, become a "great nation," but even his statesmanship could not have foreseen the peculiar and portentous circumstances which would make impossible of full realization his noble aspiration that his country should be the exemplar of an exalted justice.

Such peculiar and portentous circumstances may be summarized as the influx into our land of enormous masses of aliens, in a great measure totally foreign not only to the race of the founders of the American commonwealth but to one another; strangers to us and strangers to each other, distinct in their histories, enormously uneven in their political development, widely apart in many instances in their aspirations and ideals.

Law as administered and enforced by tribunals is, at best, a poor handmaiden of justice; under the most favorable circumstances it affords only a limited protection of rights and an even less effective redress of wrongs. Thousands have died and millions have suffered in order that our fundamental statute should declare that no state shall "deny to any person within its jurisdiction the equal protection of the law," yet our legal machinery has been unable to effectively enforce it when, indeed, it has not been used to nullify it.

If, therefore, justice even in a workaday sense is so difficult of right application to our own people, what tremendous obstacles must stand in the way of applying "an exalted justice" to the alien in our midst; to men and women, who, to a great extent, are with us but not of us, ignorant if not of things and men, often ignorant of our language and customs, and by that very ignorance rendered either

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too cunning or too confiding. If the sixth amendment to our Constitution guaranteeing the right to a speedy and public trial, by an impartial jury after due information of the nature and charge of an accusation has been so often invoked to protect the undue harassing of our own citizens, how much oftener will its check be necessary for aliens in our midst, many of whom public opinion tolerates only but never considers as brothers.

This long preamble is necessary so that what follows may not be taken as a criticism of the administration of justice in our courts, but rather as an exposition of circumstances which, in practice, often result in two measures in our tribunals, one for the native and one for the stranger. Such differences we should take cognizance of so as to minimize one of the main causes that retard assimilation of our foreign masses. For nothing, in my opinion, will more powerfully enlarge the cleavage between aliens and citizens as an unfair, partial and "special class" application of the laws, or more successfully make even the humblest of these aliens devoted children of the nation than an unprejudiced and "exalted justice."

I purpose, therefore, to show what the foreigner learns of our justice when circumstances bring him before the courts, civilly or criminally, and to study what the effect is and must be upon him of such acquaintance. I choose the case of the Italian, not only because I feel more competent to present his case, but also because he is popularly believed, though erroneously, I think, to contribute a large percentage to the statistics of our criminal tribunals, and is also in fact a not infrequent litigant in civil courts.

At the very outset, then, we discriminate between citizens and prospective citizens by statutorily classifying the latter when they come to us into desirable and undesirable. We have a clear right to do so, our first duty being to protect and defend our own country. But in applying that indefinite statutory classification we deny the aliens those legal safeguards which we give our citizens against the danger of decisions by summary, arbitrary and non-judicial tribunals. Thus there is no appeal to the judicial authorities, except in a limited sense, under our immigration laws, from the decision of the boards of special inquiry at immigrant stations. Yet boards of special inquiry are not judicial courts, but committees of government employees of a low hierarchical grade, laymen not lawyers, wielding a most tremendous power without other guarantee than their conscience.

Our immigration legislation, while perfectly justifiable as a de-

fensive measure, is against the spirit of our traditional scheme of law in that it discriminates as between alien and citizen contrary to the spirit of that law. Thus, if through our own insufficient and inefficient executive machinery, we let in an ex-convict for example, the fact that he has paid the penalty and that he has conducted himself honestly since his admission, will not prevent our deporting him if we discover our mistake within three years after his admission.

I repeat that this is all justifiable and legal, but it denies to an alien the right of rehabilitation. No American court would deny to a citizen the protection against such summary and arbitrary action even if he were an ex-convict, so long as he behaved himself. In fact, the tendency of our law for our citizens is toward rehabilitating and helping an erring brother, as our probation, indeterminate and suspended sentence legislation clearly shows. The gross disadvantage which such defensive but discriminatory laws impose on the alien is brought home by a single example I shall quote. A peasant who has been sentenced in Russia for cutting down a tree, or an Italian who has been sent to jail in Italy for stealing sea-water so as to avoid the Italian tax on salt, both of these are ex-convicts and undesirable under our law. And if they honestly confess it to the examiner on arrival our government excludes them; or if they dishonestly hide it and are allowed to land and lead honest lives and establish an honest living, yet if some vindictive competitor who knows their "crimes" turns informer before three years expire, our government deports them. All this is legal and constitutional, but is it "exalted justice and benevolence?"

The tendency, I might almost say instinct, to discriminate against resident aliens is evidenced by the large number of legal disabilities to which they have been subjected in many states. Though such disabilities are happily almost entirely removed in our country, the continuance of the tendency to discriminate, even though not legally sanctioned by statutes, is demonstrated by the provisions in existing treaties and international conventions guaranteeing reciprocal rights and equal protection to foreigners.

For example, the treaty between the United States and Italy (as most other treaties) provides as follows: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property." * * * (Art. III); and in order to render such guarantee effective the consular convention entered into between the same high contracting parties in 1878 provides that their con-

THE ALIEN AND THE CRIMINAL LAW.

sular officers "may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive, * * * in order to defend the rights and interests of their countrymen."

These are certainly solemn and ample provisions guaranteeing protection to alien residents. Yet we have repeatedly witnessed their ineffectiveness as preventives of discrimination against foreigners or as a means for legal redress against grievous wrongs to aliens. The lynching of Italians in Louisiana and Mississippi are oft-quoted examples; they serve most effectively to demonstrate the difficulty in the way of extending not an "exalted justice," but even reasonable lawful protection to the aliens in our midst. For lynching is not only an infringement of a treaty right, not merely a breach of a local statute, but a violation of a provision of the very organic law of our land, solemnly transcribed from Magna Charta—that no man shall be deprived of life and property without due process of law.

A more common violation of our fundamental juridical principles to the damage of alien is what may be classified under the title of "peonage." In a case in North Carolina, where the Italian government intervened on behalf of several Italians who had been shot in a labor-camp trouble, the following testimony was elicited from the camp superintendent on cross-examination:

Q. "Have you used, or caused the use of any force or threats to prevent laborers from leaving that camp when they wanted to?"

A. "At one time I did. That was in March. I went out and brought ten or twelve men back. I went about one-half mile."

Q. "Did you order them back with arms in your hands?"

A. "Yes, sir. I did not have any warrant to arrest them. They were Slavs and Hungarians. We tried to treat them all alike, Italians and Hungarians." Yet the man who admitted this was never punished despite the combined efforts of the federal officers and of the legal representatives of a foreign power.

The ineffectiveness of treaty guarantees to protect those whom we have by such high contract solemnly agreed to defend was ably set forth by President Taft in one of his campaign speeches. "Our country," he said, "now become a world power, and entering into treaties of this kind with every government on earth, is put in the most pusillanimous position of promising that subjects of another country shall be properly treated, and then of having no means of carrying out the promise, or of punishing those who violate it. Fancy the feeling of a secretary of state who is obliged to say to a

foreign country: "It is true we agreed to protect your citizens or subjects if they came over here and conducted themselves peaceably, but under our form of government and laws, while we made that promise, and had a right to make it, we have no means of complying with it. All we can do is to make a respectful presentation of it to the state authorities and ask them as a favor to enforce the laws."

Let it not be thought, however, that the disadvantageous position of the foreigner before our courts, despite treaty guarantees and international comity, is limited to those exceptional cases of danger to life and limb through the inflamed passions of an angry mob. A striking example of how such disadvantage manifests itself in everyday procedure in courts of law is found in a very different field. Take that of the administration of the estates of poor aliens dying in our largest center of immigration, New York City. Very many Italians are killed as a result of accidents while at their work; the "estate" left by these is generally only a right to the surviving next of kin to bring an action for damages for the negligent killing of the decedent. I omit the dangers of such precarious estates due to methods and machinations of "runners," ambulance chasers and shysters, for these can be said to be disadvantages or dangers due to ignorance rather than alienage. I have in mind rather the disadvantages that result from the law itself. Many of these foreigners so killed have here no one to represent their rights in succession. Such right may be extremely valuable to their absent next-of-kin; they may, and often do, represent the "fortune" left by the laborer to his widow and children. In such cases it would seem obvious that the intervention of consular officers "to defend the rights and interests of their countrymen" should be welcomed by probate courts, and the treaty provisions guaranteeing such intervention be broadly interpreted by them. Yet in practice, while the surrogates of the state of New York, for example, have sympathetically approved of the efforts of the highest accredited Italian officials to put a check on the gross abuses in the liquidation of such estates, they have found themselves greatly hampered and limited by the laws themselves, laws which contemplated conditions diverse from those existing to-day in "foreign New York." Thus local laws which aimed at the enforcement of the doctrine of state rights clash unduly with the obligations of international comity and reciprocity and even find themselves in opposition to the clear guarantee of the federal constitution which provides that "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be

THE ALIEN AND THE CRIMINAL LAW.

made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Let me give a humble but typical example "under the law." Antonio Luca, an Italian laborer, less than two months in this country, is accidentally killed in the yard of a railroad company which employs him; in his short residence he has made few, if any, friends; is known by his gang boss either as "Tony" or by the number of the brass check which the coroner will afterward find on his body. In Italy probably he has a wife and a couple of infant children. The accident having happened in a private yard, nine chances in ten the police will not be allowed to enter to investigate the accident. The coroner will hold a perfunctory inquest; the body will likely be sent to the morgue, and every trace of the accident wiped out. Months afterward the widow, failing to receive the money her husband sent her regularly, will ask the mayor of her town to write to the consul in America for information. Upon due investigation, the consul, nine chances in ten, will discover that a local undertaker "somehow" hearing of said accident has generously taken said body from the morgue and buried it with funeral pomp. Why? Because he thereby became a "creditor of the estate" and as such he could and did apply to the court to be appointed administrator. As such he entered, as was his legal right, into an agreement with his lawyer to pay him fifty per cent of any damages recovered for the death of the intestate besides costs and disbursements. He will find that the lawyer thereafter eventually "certified" to the court that a settlement, say of \$200, offered by the railroad company is a fair adjustment and that the court, under its rules, approved it; that the company paid said sum to the administrator, who has duly paid fifty per cent thereof to his attorney as agreed, besides "costs and disbursements," or let us say \$25 more. From the balance of \$125 the administrator will pay his bill as undertaker, probably \$80 or \$90, besides his official commissions and disbursements. The "residue" will go to the widow and children. Every single act in this proceeding is well within the law. So strictly legal is it all that even the sympathy and support of the surrogate court in a proceeding by the Italian consular authorities on behalf of the absent alien next-of-kin may not upset it, however it may loathe it. The right of administration by a creditor under the circumstances of such a case is a matter of legal enactment, and a lawyer's contract for fifty per cent contingent fee, besides costs and

disbursements, has the approval of the Court of Appeals of New York. It is all legal; but is it "exalted justice and benevolence?" But an even more serious situation as regards estates of this nature exists now in Pennsylvania, where a judicial doctrine has been announced which in effect leaves a vast proportion of alien laborers wholly unprotected. The United States Supreme Court, despite the treaty guaranteeing the same protection to aliens as to citizens, has upheld the judgment of the Pennsylvania courts to the effect that the next of kin of an Italian laborer killed through the negligence of his employer cannot recover damages for his death under the Pennsylvania statute unless residing in the state at the time of such negligent killing. Thus, in effect, no safeguard need be taken by employers in Pennsylvania against accident to Italian laborers when such laborers have their families in Italy.

Let us glance now at the position of the alien himself, rather than his estate, before our courts. It is matter of common knowledge among lawyers engaged in accident litigation for foreigners that it is difficult to obtain a jury that will not, under oath, admit a lower money valuation for injuries to aliens than to citizens of equal condition in life. And consider the impression that our alien population must get of some of our laws furnished by the recent litigation upon bonds given by surety companies under what is known as the Wells law of 1907 and its amendment of 1908.

The Wells law was enacted in New York state for the protection of the immigrant depositors of the East Side in small Italian banks; it provided that such banks, as in conjunction with banking carried on a steamship ticket business, should file a bond in the penalty of \$15,000 with the state comptroller guaranteeing the safe transmission of moneys intrusted to such banks; the amendment of 1908 extended such guarantee to deposits as well as to moneys intrusted for transmission. During the late crisis over forty private bankers doing business with Italian immigrants failed, the majority of which were bonded under the Wells law. Some of the surety companies who issued this class of bonds and accepted premiums therefor, have refused payment and stubbornly resisted in court their liability under such bonds, claiming among other things, that the law under which they issued such bonds and received their premium was unconstitutional. Even when the Italian authorities in this country, stirred by the unfortunate situation of hundreds of their subjects, intervened in and out of court, they found, if possible, even greater resistance to the payment of such liability. All this may be legal, but the alien

THE ALIEN AND THE CRIMINAL LAW.

litigant who gets his first lesson of American courts through this kind of litigation, will not think, nor can we expect him to think, that it is an example of "exalted justice."

But however impartial the intent of the law, and however intelligent and indulgent the jury, the great handicap to the alien litigant in any case, civil or criminal, is his ignorance of the language, thus necessitating the use of interpreters. The law generally provides for certified interpreters and for the right to qualify them by cross-examination if doubt exists as to their capacity or expertness. These are, theoretically, wise legal controls; but in practice they leave the alien accused very often unprotected by the safeguards of the sixth amendment of our Constitution. I know of many cases within my experience (easily duplicated) where the alien accused was tried and convicted without his knowing what the charge against him was. I know of others where the accused was advised to plead guilty, although he had a good defense; and the advice was often substantially just, owing to the impossibility of presenting such defense properly or convincingly. These are cases of foreigners who cannot communicate directly with their counsel and through the same lack of reliable interpreters cannot make out their case with the court. In such circumstances it is often safer to plead guilty and rely on the mercy of the court than to go through the form of a blind proceeding. It is an intellectual impossibility, for instance, for an interpreter to understand and speak all the dialects of Italy, varying from the Gallis-influenced Piedmontese of the north, and the harsh Genoese, to the diverse dialects of Sicily with their mixture of Arabic, Greek and Norman. As was well said in the report of the State Immigration Commission, "the non-English speaking alien holds all his relations with the court through the intermediation of the interpreter. His hope of justice depends on this official." To further quote from said report during the year ending December 31, 1907, the Court of General Sessions in New York City returned convictions in 1,041 cases in which the defendant was foreign born. The magistrates' courts of the first division committed or held for trial 29,992 foreign-born persons. Altogether, in that year, the nine magistrates' courts of the first division disposed of 139,047 cases, of which probably over one-half were natives of some foreign country. Add to this the many foreign born coming before magistrates requesting summonses and warrants, of witnesses, etc., and deducting the large proportion of foreigners who speak English, and there still remains a very great number of non-English speaking aliens and immigrants who annually have recourse,

willingly or unwillingly, to the courts. For these there is an inadequate and ill-regulated interpreter service.

In connection with this subject it would be important to consider the nature of the offenses for which aliens are brought into our criminal courts, a consideration which I believe would clear up some misconceptions as to the criminality of our aliens. In regard to this the New York Immigration Commission showed that in the statutes of crimes by our resident aliens a substantial percentage of convictions are for violations of corporation ordinances and the sanitary code. Thus, next to the violations of corporation ordinances by immigrants come the violations of the sanitary code. During the year 1907, 3,209 immigrants were held or committed in the magistrates' courts of the first division on this one charge. The recent legislation in New York state regarding inferior courts will help to carry out the recommendations of the New York Immigration Commission, which were as follows: that offenses against municipal ordinances be tried in the civil instead of the criminal courts, that fines should be imposed instead of imprisonment, and wherever possible (especially for violation of the sanitary code and the corporation ordinances) the responsible principal should be the party arraigned instead of, as now, his ignorant agent. I would add that suspension of sentence for alien first offenders should be more generously applied where it appears that the offense is either due to ignorance or where the evidence is given second hand through an interpreter.

These deficiencies and handicaps which I have pointed out are specially applicable in those courts where our aliens most often get their object lessons in American injustice. It is to the police courts, and lower courts of first instance, that they generally apply for redress or to which they are brought for infraction of the law. It is in such courts that legal procedure is most summary and the legal bulwarks least strong. It is especially true of these courts that "no judge is wiser than his interpreter." Cases must be disposed of with dispatch and the interpreter is more apt to interpret the desire of the court in this respect than the answers of the accused. In cities of large alien population the appointment of judges of popular courts who know the language and customs of such foreigners seems to me not only a solution of this problem but the clear duty of our municipalities. Such appointments would be less of a recognition of a growing "alien electorate" than an appreciation of, and provisions toward, a real civic need. It would be rendering a just service to

THE ALIEN AND THE CRIMINAL LAW.

these foreign residents and it would result in a great good to ourselves.

We are all, irrespective of our birthplace, filled with the instinct for fair play; the feeling of outrage in the face of injustice is a universal sentiment. We respect the law that protects us in our life and property and in our pursuit of happiness. In the end, the best of us would rebel against a judicial system which did not furnish a substantially effective defense against palpable and recurring injustice. Washington's ideal, however exalted and perhaps impossible, must nevertheless be the guiding principle in our practice. We should follow his behest that we give a "magnanimous example to mankind" by setting about resolutely to offer such example to the aliens in our midst. We may regret that there is such a large foreign element in the Republic; we may doubt if even this young and resourceful country can assimilate it. But whether for good or evil these aliens are here with us; even if we think it wisdom to shut the gates to further invasion there is still the problem of those already within, and doubts and fears and *post-facto* regrets will not solve the problem. Let us instead, patiently, as with children rather than with "bloody furreiners," bring them to a practical knowledge of that solemn promise for which we have labored and fought that there shall be denied to "no person" within our land "the equal protection of the laws." There are, as I have endeavored to show, great obstacles in the way, but it will be an inspiring work, well worth our best efforts.